IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Mangilal v. Purshottam & Ors.

S.B.CIVIL WRIT PETITION NO.2665/2005
under Articles 226 and 227 of the Constitution of India.

Date of Order : 12th January, 2006

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Manish Sisodia, for the petitioner.
Mr. Sajjan Singh, for the respondents.

BY THE COURT :

This petition for writ is directed against the order dated 1.4.2005 passed by learned Civil Judge (JD), Udaipur City (South) rejecting the application preferred by the plaintiffs under Sections 65 and 66 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Act of 1872”).

The factual position required to be noticed is that the plaintiff-petitioner and the proforma respondents (respondents No.5 and 6) filed a suit for permanent injunction, so as to restrain the defendant-respondents from obstructing the right of the way said to be enjoyed, by a period of more than 50 years. The

plaintiff averred in the plaint that to obviate any further dispute between the parties to the suit, including their predecessors, entered into a written agreement on 27.2.1979.

The defendants in written statement denied the right of way as claimed by the plaintiff and also denied about writing of agreement dated 27.2.1979. The defendants alleged that the writing dated 27.2.1979 as forged and fabricated document.

As the existence of the writing dated 27.2.1979 was denied and the same was not produced by the defendants, the plaintiffs moved an application under Section 65 and 66 of the Act of 1872 to permit them to give secondary evidence relating to the document dated 27.2.1979. The defendants by way of filing a reply to the application stated that no secondary evidence can be given relating to the document which does not exist. The defendants reiterated the allegations about fabrication of the document and also stated that in the year 1979 the mechanical process of photocopying was not in common use.

By the order impugned the trial court rejected the application by holding that no permission to give secondary evidence can be given as the existence of written dated 27.2.1979 itself is in

dispute. While giving challenge to the order impugned dated 1.4.2005 it is urged by counsel for the petitioner that the defendants denied existence of document concerned to obviate their liability to produce the same at the time of evidence. The secondary evidence, according to counsel for the petitioner, could not be denied in present set of facts only for the reason that the defendants denied existence of original document. It is further stated that though the defendants disputed existence of document dated 27.2.1979 but yet it is not proved that the document does not exist, therefore, in view of the provisions of Section 65(a) of the Act of 1872 the trial court should have allowed the plaintiffs to give secondary evidence. To substantiate the contention reliance is placed by learned counsel for the petitioner upon Single Bench judgment of this Court in the case of Malkit Singh v. the Special Court, NDPS Cases, Sri Ganganagar, Rajasthan & Ors. (SBCWP No.6243/05) decided on 25.10.2005. A reliance is also placed by learned counsel for the petitioner upon a judgment of Hon'ble Supreme Court in the case of Nawab Singh v. Inderjeet Kaur, reported in AIR 1999 SC 1668.

After going through the judgments referred above I am of the opinion that the judgments, on which reliance is placed by counsel for the petitioners, are having no application in present controversy. In the case of Nawab Singh (supra) Hon'ble Apex Court held

that the trial court is not justified in forming opinion that the rent note sought to be produced as secondary evidence was of doubtful veracity without affording the plaintiff an opportunity of adducing secondary evidence. The case before the Apex Court was not of non-existence of original document. In the said case a doubt was created about the original document with the allegation that it was not executed.

Learned Single Judge of this Court in the case of Malkit Singh (supra) while considering the contention that whether the petitioner in that case will be deprived from raising the objection about admissibility of document given in secondary evidence subsequently during the trial of the suit, held that the petitioner shall be free and entitled to raise the objection about admissibility of the secondary evidence as the issue about existence of document was not decided. In the aforesaid case learned Single Judge was also of the view that a document which is or was in existence, for that document only secondary evidence can be produced.

In the instant case the plaintiff petitioner failed to show and also does not appear that the original document dated 27.2.1979 is in possession or power of the defendants. The defendants have not admitted in return the existence, conditions and contents of the document concerned. On the contrary,

the defendants came with specific case that the document sought to be placed on record to give secondary evidence is forged and fabricated document. The application preferred by the plaintiffs under Section 65 of the Act of 1872 apparently does not satisfy the circumstances and conditions for permitting them to given secondary evidence.

It is further pertinent to note that from reading of the application (Anx.5) it does not reveal that the photocopy of the document sought to be produced as secondary evidence was made from its original by a photostat machine. This Court in the case of Rajasthan Golden Transport Co. v. LRs of Amritlal, reported in RLW 1998(1) Raj. 683, in similar circumstances held that the court while permitting to produce secondary evidence is required to satisfy itself whether the document sought to be produced falls within the definition of secondary evidence as defined in Section 63 of the Act of 1872. If no material is available on record to show that the photocopy was obtained through its original, the document cannot be treated as secondary evidence.

In the instant case as stated above the plaintiffs nowhere in the application under Section 65 of the Act of 1872 stated that the photocopy was obtained by its original, as such in view of law laid down by this Court in the case of Rajasthan Golden

Transport Co. (supra) the document sought to be produced also not falls within the definition of secondary evidence as defined under Section 63 of the Act of 1872. While holding as above, it is relevant to note the fact that in the year 1979 the mechanical process of photocopying was also not in frequent common use. The plaintiffs in the circumstances should have given the details as to how and in what circumstances the said copy of the document was obtained by mechanical process.

In result of discussion above, I do not find any merit in the petition, therefore, no interference is required to be made by this Court with the order impugned while exercising powers under Article 227 of the Constitution of India. The writ petition, therefore, is dismissed with no order as to costs.

(GOVIND MATHUR),J.

kkm/ps.